IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.775 OF 1997

The State of Maharashtra ...Appellant.

V/s

Balasahib Baburao Shinde,
32 yrs. R/o. Vithalnagar,
Jail Road, Nasik Road. ...Respondent.

Mr. D.R. More, APP for the State.

Mr. S.J. Ghogare & Ms. Anita Y. Patil, advocates for respondent.

CORAM: V.G. PALSHIKAR &
R.C. CHAVAN, JJ.

DATE: 7th July, 2005

ORAL JUDGMENT: (Per R.C. Chavan, J.)

1. Taking exception to respondent's acquittal by learned Additional Sessions Judge, Nashik for an offence punishable under section 302 of the Indian Penal Code, State has appealed.

2. The facts which led to prosecution of the respondent are as under:-

3. Respondent and his wife Anita were residing at Vitthal Nagar Jail-Road, Nashik in premises owned by one Annasahib Shelke. There used to be disputes resulting in landlord's insistence that respondent -

accused should vacate the premises. Instead of searching for alternative accommodation, respondent used to harass the victim - his wife and asked her to search for premises. In course of quarrel on the night of 9/10/1996, victim poured kerosene on her person when the respondent asked her to burn herself. On seeing this, respondent too poured kerosene on her person and set her on fire by lighting a match stick. Anita sustained severe burns. She was taken to hospital where she succumbed to her injuries on 11/10/1996. Before that, police had caused her dying declaration to be recorded by Special Judicial Magistrate. Police registered the offence, recorded statements of witnesses and, on completion of investigation, arrested and charge-sheeted the accused.

4. The learned Judicial Magistrate, First Class, Nashik Road, committed the case to the Court of Sessions Judge, Nashik where it was assigned to the Additional Sessions Judge. The learned Additional Sessions Judge framed charge of offence punishable under section 302 of the Indian Penal Code to which the accused pleaded not guilty and claimed to be tried.

5. In its attempt to bring home the guilt of the accused, prosecution examined as many as 10 witnesses. The learned Additional Sessions Judge examined the accused under section 313 of the Criminal Procedure Code and upon consideration of prosecution evidence, in the light of arguments advanced, came to hold that the prosecution failed to prove the guilt of the accused and proceeded to acquit him. Aggrieved thereby, the State has appealed.

6. We have heard the learned Additional Public Prosecutor for the State. The learned Additional Public Prosecutor has assailed the findings recorded by the learned trial judge, pointing out that there was a dying declaration recorded by Special Judicial Magistrate, which the learned trial judge discarded for grossly inadequate reasons. He submitted that the reasons given by the learned trial judge in paragraphs 10 and 11 of his judgment to discard the said dying declaration are not adequate. In view of this argument, we have re-assessed the evidence. It may be seen from the notes of post-mortem examination at Exhibit-16 proved by P.W. 3 - Dr Bhanudas Gaikwad that the victim died of 95% burns. He was cross-examined with reference to Modi's Medical Jurisprudence and Toxicology to concede that in case

of deep and extensive burns, percentage of oxygen in blood is reduced and it affects functioning of the brain. Since Dr. Gaikwad had stated in his examination-in-chief that death was due to deep and extensive burns, it may have to be inferred that functioning of brain might have been affected due to these types of burns.

7. This would assume importance in order to consider correctness of dying declaration - Exhibit-25 proved by P.W. 5 - Shri Bhagwat Khare, Special Judicial Magistrate who stated that on 9/10/1996, at about 10.40 p.m., he received a requisition - Exhibit-24 from police and immediately proceeded to Bytco Hospital at 11.55 p.m. He requested Dr. Chaudhary, who was on duty, to examine the patient and certify whether the patient was in a position to give statement. Dr. Chaudhary accordingly made an endorsement that the patient was fit to make statement. This endorsement appears at the top of Exhibit-25. Shri Khare then states that he introduced himself to the patient after asking all the relations to go out, inquired of her name, address etc. and then recorded the dying declaration in question and answer form. He read it over to the victim and obtained a thumb impression of the victim. He too

signed it and again called Dr. Chaudhary to examine the patient and certify whether the patient was conscious. Accordingly, Dr. Chaudhary made requisite endorsement at the foot of Exhibit-25. The process of recording dying declaration was over at 00.25 hours.

8. Dr. Chaudhary who should have been examined to prove the endorsement on Exhibit-25 was, unfortunately, not available. P.W. 4 - Mrs. Phillips, serving as nurse in Bytco Hospital, stated that Dr. Chaudhary had met with an accident and was admitted to hospital at Bombay. Mrs. Phillips stated that she had attended the victim at about 9.30 p.m. only at the time of admission. She stated that relatives who had brought the victim gave history that the victim had sustained burns due to blast of a stove while cooking at house. A note was accordingly made in the admission form. Thus, it may be seen that the first record about incident made by an independent authority is that the victim had met with burns due to flaring of a stove.

9. P.W. 1 - Annasahib is the landlord, whose desire to evict the victim's husband had, in fact, led to quarrel. He stated that at about 9.30 p.m. he and his wife heard cries from the tenement of accused and

immediately went to the tenement. He saw the victim burning and the accused attempting to extinguish the fire by wrapping his wife with quilt. He too claims to have tried to extinguish fire by wrapping a blanket around the victim. His wife extinguished fire caught by gunny bag inside the house of the accused. He stated that there was a stove near the gunny bag which had caught fire. The presence of stove is also mentioned in panchnama of spot at Exhibit-5 though, curiously, it does not seem to have been seized. He asked the accused to bring rickshaw to take the victim to hospital. One Sangle also came on Scooter and Annasahib carried the victim on Scooter of Sangle to Bytco Hospital, Nashik. He claims to have inquired with the victim as to how she caught fire and the victim told him that she caught fire due to flaring up of the stove. In cross-examination by Additional Public Prosecutor, he denied the recitals in his statement about quarrels between husband and wife.

10. P.W. 2 - Sangle, on whose Scooter the victim was carried to hospital, stated that the victim was wrapped up in blanket. The victim as well as Annasahib told him that the victim had sustained burns due to flaring up of the stove. He too was declared hostile and contradicted relevant portions of his

police statement.

11. Exhibit-10 is the order issued to the Police Head Constable Deshmukh by the Police Station Officer, Nashik Road. It mentions that it was issued at 22.10 p.m. It recites that Sister Phillips from Bytco Hospital had informed that the victim had sustained 95% burns on 9/10/1996 at about 21.45 hours due to flaring up of a stove. This corroborates version of P.W. 4 - Mrs. Phillips.

12. P.W. 6 - Murlidhar is the brother of the victim. He states about quarrels between respondent and the victim on account of drinking habits of the accused. On 9/10/1996, at about 2.00 a.m., his brother Vishnu received telephonic message from the Nashik Road Police Station and he, therefore, went to the Bytco Hospital at 3.00 a.m. When he inquired, he was told by his sister that there was a quarrel between the respondent and herself and the respondent set her on fire by pouring kerosene on her person. Similar is the version of P.W. 7 - Sopan Aher, another brother of the victim.

13. P.W.8 - P.S.I. Ashok Deshmukh had been ordered vide Exhibit-10 to go to hospital and to arrange for

Special Judicial Magistrate to record dying declaration. He got the copy of dying declaration from the Magistrate and submitted a report to A.P.I. Deshpande, who registered the offence. This witness had, however, himself not asked any questions to the victim.

14. P.W. 9 - Suresh Deshpande conducted investigation in part and handed it over to P.W. 10 - Mahale, who eventually submitted a charge-sheet.

15. The learned trial judge did not rely on dying declaration recorded by P.W. 5 - Khare. This is because though Khare stated to have put some questions about family disputes to the victim, but he did not record these questions and answers thereto in the dying declaration. Also curiously, Shri Khare did not think it necessary to tell the court first hand as to what victim had stated about cause of her death. He was content at proving the dying declaration. This witness also stated that the Medical Officer had merely asked the victim her name and address and perused the case papers before certifying that the victim was fit to make dying declaration. Thus, according to P.W. 5 - Khare, Dr. Chaudhary had not medically examined the victim before issuing such

certificate.

16. In the context of Dr Gaikwad's statement that the victim had suffered deep and extensive burns and that, in such cases, due to reduction of oxygen supplied to the brain, the brain functioning is affected, it was necessary for Dr. Chaudhary to examine the patient thoroughly and to find out whether she was well oriented to make a dying declaration. Therefore, both the possibilities viz., first, that of victim having stated what she imagined in her physical state as it was at the time of recording dying declaration and, secondly, that of the dying declaration being not so accurate account of what was stated, have not been ruled out. Had every question and answer been recorded, it may have been possible to examine veracity of the dying declaration contextually.

17. In these circumstances, if the learned trial judge felt that he ought to rely on versions of P.W. 1 - Annasahib and P.W. 2 - Sangle who were persons to whom the victim had immediately made disclosure about cause of her injuries, in preference to version recorded by P.W. 5 - Khare, Special Judicial Magistrate, it may not be open to assail the approach of the trial judge as perverse, or to say that the

conclusions drawn by him do not satisfy the test of probability. The disclosure was made to P.Ws. 1 and 2 by the victim in her husband's absence, since he had gone to get a rickshaw and therefore without any pressure, without any premeditation and was spontaneous. It is a settled principle of criminal jurisprudence that when the trial judge, who had an opportunity of watching the witnesses in person, takes a particular view of the matter on appreciation of evidence tendered before him and if such view is not shown to be improbable, the appellate court should be slow to substitute its own view for the one taken by the trial judge.

18. In view of this, we find that the conclusions drawn by the learned trial judge upon appreciation of evidence are perfectly probable and do not call for any interference from us. Consequently, this appeal by the State is dismissed.

(V.G.PALSHIKAR, J.)

(R.C. CHAVAN, J.)